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No. 93-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC. and ROCKET REFUND, INC.,
Petitioners,

v.

WILLIAM T. GRAHAM, COMMISSIONER OF BANKS, NORTH CAROLINA BANKING COMMISSION,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the national system of federal income tax regulation preempt the North Carolina Refund Anticipation Loan Act pursuant to the Supremacy Clause of the United States Constitution?

2. Does the North Carolina Refund Anticipation Loan Act Violate the Commerce Clause of the United States Constitution?

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN THE COURT BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
1. Proceedings Below	4
2. Statement of Facts	6
REASONS FOR GRANTING THE WRIT	10
I. THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING PRE-EMPTION	14
A. This Court Has Enunciated The Standards To Be Used In Determining Pre-emption	14

B. The Decision Of The Supreme Court Of North Carolina Violates The Tests Enunciated By This Court 28

II. THE NORTH CAROLINA REFUND ANTICIPATION LOAN ACT IS UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE EFFECT OF THE ACT IS TO CONTROL NATIONAL BANKING TRANSACTIONS BEYOND THE STATE'S BORDERS AND TO UNDERMINE UNIFORMITY OF REGULATION 42

A. The Effect Of The North Carolina Refund Anticipation Loan Act Is To Control National Banking Transactions Outside Of The State 42

B. The North Carolina Refund Anticipation Loan Act Undermines The Uniformity Of The Federal Tax System 52

CONCLUSION 60

TABLE OF AUTHORITIES

Cases:	Page
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	21
Cipollone v. Liggett Group, Inc. 505 U.S. ____, 112 S. Ct. 2608 (1992)	30
Cooley v. Board of Wardens, 53 U.S. 299 (1851)	54
De Canes v. Bica, 424 U.S. 351 (1976)	28
Edgar v. Mite Corp., 457 U.S. 124 (1982)	45,46,47,48,49
FMC Corp. v. Holliday, 498 U.S. ____, 111 S. Ct. 403 1990	24-25
Felder v. Casey, 487 U.S. 131 (1988)	15,27
Fidelity Federal Savings and Loan Assn. v. De la Cuesta, 458 U.S. 141 (1982)	14,19,22
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	15
Free v. Bland, 369 U.S. 663 (1962)	27-28
Gade v. National Solid Wastes Management Ass'n, ____ U.S. ____, 112 S. Ct. 2374 (1992)	25

Gibbons v. Ogden, 9 Wheat (U.S.) 1 (1824) 55

Healy v. Beer Institute, Inc., 491 U.S. 324 (1989) 43,50

Hines v. Davidowitz, 312 U.S. 52 (1941) 15,31

Hughes v. Oklahoma, 441 U.S. 322 (1979) 43

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 26

Lyeth v. Hoey, 305 U.S. 188 (1938) 29

Michigan Canners and Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461 (1984) 27

Morales v. Trans World Airlines Inc., ____ U.S. ____, 112 S. Ct. 2031 (1992) 24

Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985) 25

Perez v. Campbell, 402 U.S. 637 (1971) 15

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 17

Rice v. Santa Fe Elevator Corp.
331 U.S. 218 (1947) 15

Shafer v. Farmers Grain Co.,
268 U.S. 189 (1925) 44

Shaw v. Delta Air Lines, Inc.
463 U.S. 85 (1983) 14

Southern Pacific Co. v. Arizona,
325 U.S. 761 (1945) 54,55

Swartz v. H & R Block, Inc., 119
B.R. 219 (U.S. Bankruptcy
Court, D. Idaho, 1990) 57

United States v. Snyder, 149 U.S.
210 (1893) 28

United States v. Union Cent. Life
Ins. Co., 368 U.S. 291 (1961) 36

Welton v. Missouri, 91 U.S. 275
(1876) 52

Wisconsin Dept. of Industry v.
Gould Inc., 475 U.S. 282
(1986) 27

Wyoming v. Oklahoma, ____ U.S.
___, 112 S. Ct. 789 (1992) 43

Statutes:

Cal. Civ. Code Ann. § 711 (West 1982) 20

N.C.G.S. § 53-247 37

N.C.G.S. § 53-248 37

N.C.G.S. § 53-249 38

N.C.G.S. § 53-250 39

N.C.G.S. § 53-253 39

26 U.S.C. § 6011(e) 6

26 U.S.C. § 6060 33

26 U.S.C. § 6402(a) 56

26 U.S.C. § 6107 32

26 U.S.C. § 6109 32

26 U.S.C. § 6694 32

26 U.S.C.S. § 6713 58

26 U.S.C.S. § 7213 58

26 U.S.C. § 7701(a)36A 33

26 U.S.C. § 7805(a) 32

26 U.S.C. § 7805(c) 32

28 U.S.C. § 1257(3) 3

29 U.S.C. § 1144(a) 25

Regulations:

26 CFR 1.6695.1 33

26 CFR 601.602 6

Part 1, Sections 6012, 6061.:1.6012-5 and 1.6061-1 6

Other Authorities:

Article I, Section 8, Clause 3 of the United States Constitution	3
Article VI, Clause 2 of the United States Constitution	3
H. R. Rep. No. 658, 94th Cong., 2d Sess. 6 (1976)	35
H. R. Rep. No. 658, 94th Cong., 2d Sess. 274 (1976)	58
Internal Revenue Service Announcement 92-153 (Oct. 26, 1992)	10
Revenue Procedure 90-62	6, 56
Revenue Procedure 91-69	56
Revenue Procedure 93-8	33,56
S. Rep. No. 938, 94th Cong., 2d Session 351 (1976)	35

NO. 93 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC. AND ROCKET REFUND, INC.,

Petitioners,

vs.

WILLIAM T. GRAHAM, COMMISSIONER OF BANKS, NORTH CAROLINA BANKING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioners, the North Carolina Association of Electronic Tax Filers, Inc. and Rocket Refund, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this

proceeding on May 7, 1993.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 333 N.C. 555, 429 S.E. 2d 544 (1993) and is set out in the appendix to this petition at pages 1a-33a. The judgment of the Superior Court of Wake County, North Carolina dismissing the case on summary judgment is set out in the appendix at pages 34a-36a.

JURISDICTION

The judgment and opinion of the Supreme Court of North Carolina affirming the Court's dismissal of the case was entered on May 7, 1993. On July 7, 1993, Chief Justice Rehnquist entered an Order extending the time for filing a petition for writ of certiorari to and including Saturday, September 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article VI, Clause 2 of the United States Constitution, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

This code also involves Article I, Section 8, Clause 3 of the United States Constitution, which states:

> Sec. 8, Cl. 3. Power of Congress to regulate commerce. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The North Carolina Refund Anticipation Loan Act, N.C.G.S. §§ 53-245 to 53-254, is set out in the Appendix at pp. 36a-46a.

STATEMENT OF THE CASE

1. PROCEEDINGS BELOW

The petitioners, the North Carolina Association of Electronic Tax Filers, Inc. and Rocket Refund, Inc., brought this action on January 2, 1992, in the Superior Court Division of the General Court of Justice in Wake County, North Carolina, against William T. Graham, Commissioner of Banks, North Carolina Banking Commission. This Declaratory Judgment action was brought pursuant to Rule 57 of the North Carolina Rules of Civil Procedure, and alleged that the North Carolina Refund Anticipation Loan Act, N.C.G.S. 53-245 to 53-254, is unconstitutional in that it violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

The case was heard on a motion for summary judgment on February 12, 1992, and

an Order of Dismissal was entered on February 14, 1992 granting summary judgment in favor of the respondent, and denying petitioners' motion for summary judgment. Petitioner gave Notice of Appeal to the North Carolina Court of Appeals on March 5, 1992. On June 23, 1992, the Petitioner filed a Petition for Discretionary Review with the Supreme Court of North Carolina prior to a determination by the North Carolina Court of Appeals. The Petition for Discretionary Review was allowed on July 16, 1992. On May 7, 1993 the Supreme Court of North Carolina filed its Opinion affirming the lower court, and holding that the North Carolina Refund Anticipation Loan Act does not violate the Supremacy Clause and Commerce Clause of the United States Constitution.

2. STATEMENT OF FACTS

In 1986, the Internal Revenue Service of the United States established a national program for the electronic filing of federal income tax returns. 26 U.S.C. § 6011(e). Since the beginning of this program, the Internal Revenue Service has promulgated numerous rules for electronic tax filers. Revenue Procedures 90-62, 91-69, 93-8. In addition, the basis for the Internal Revenue Procedures is found in federal regulations promulgated by the Secretary of the Treasury. 26 CFR 601.602; Part 1, Sections 6012, 6061: 1.6012-5, and 1.6061-1. Revenue Procedure 90-62 is entitled "Obligations of Participants in the Electronic Filing Program for Form 1040, U.S. Individual Income Tax Return."

As a result of the Internal Revenue System's Electronic Tax Filing Program, a new industry of electronic tax filers

sprang up in North Carolina and throughout the nation. The North Carolina Association of Electronic Tax Filers, Inc. is comprised of electronic tax filers in North Carolina who are participants in this federal program. One of these members is Rocket Refund, Inc.

The Electronic Filing Program of the Internal Revenue Service involves two primary areas of regulation: (1) the electronic filing of federal tax returns and (2) tax refund loans (known as RALs), which provide taxpayers with quick refunds after they file their federal tax returns electronically.

On October 1, 1990, North Carolina General Statutes §§ 53-245 to 53-254, entitled "Refund Anticipation Loan Act" went into effect. The Act seeks to regulate tax refund loans (RALs) and mandates registration of all tax preparers

in North Carolina who desire to participate as facilitators in the electronic filing of federal tax returns and tax refund loans. The Act requires the payment of registration fees for each facilitator's business locations. The Act provides civil and criminal penalties, and sets forth disclosure requirements, and seeks to regulate the tax refund loan process by facilitators (tax preparers) in North Carolina. The Commissioner is given broad powers to carry out the purposes of the Act.

As it applies to members of the Association and other electronic tax filers, the process of the electronic filing of federal tax returns and tax refund loans includes the following: (1) the taxpayer enters a collection center, leaves his completed tax return, and fills out IRS Form 84533 and a Disclaimer. If he

is applying for a refund anticipation loan, he will also fill out an RAL Application. Those taxpayers receiving an RAL loan will return within five to seven days to pick up their net refund check. (2) The data center will enter the return into the computer and transmit the information to a service bureau. The service bureau will then transmit the information to the IRS and a national out-of-state bank providing the RAL loan. If the IRS and the bank approve the amount, the data center is then given authority to cut a check to the taxpayer. The courier service returns the check to the collection center, and the taxpayer returns to the collection center to receive the refund. Approximately ninety percent (90%) of those individuals in North Carolina who electronically file federal income tax returns also apply for the refund anticipation loans.

REASONS FOR GRANTING THE WRIT

This case presents important and novel constitutional questions involving federal income tax and national banking policy. The Writ of Certiorari should be granted because of the following compelling issues of national importance.

First, electronic filing of federal income tax returns has been described by the Internal Revenue Service as "the wave of the future," with the specific desire "that electronic filing will be the standard filing format by the end of the century." Internal Revenue Service Announcement 92-153 (Oct. 26, 1992) Today millions of taxpayers are using the electronic filing process. As of the 1991 filing year, 417,230 federal tax returns were electronically filed by North Carolina citizens. The Internal Revenue Service actively promotes electronic filing of

federal tax returns in every state.

Second, the North Carolina Refund Anticipation Loan Act constitutes a direct barrier to the participation by tax preparers in the national program of electronic filing of federal tax returns. The Internal Revenue Service has established three criteria for participation in this national program. However, North Carolina has established additional and different requirements for tax preparers in that state. This has created a conflict in regulation. A tax preparer may be approved by the Internal Revenue Service to do electronic tax filing, and yet be precluded from doing so by the North Carolina Act. Such state regulation significantly interferes with the methods by which the federal system was designed to meet its goals. In addition, the North Carolina Act gives the state

Banking Commissioner the authority to regulate fees, which conflicts with the free market approach taken by the Internal Revenue Service.

Third, the ramifications of the North Carolina Act on the comprehensive federal tax system are significant. If each state were to adopt such an approach, it would undermine the comprehensive and uniform federal scheme of regulation and create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude. This would result in chaos, and the frustration of the federal tax system.

Fourth, an important part of the Internal Revenue System's Electronic Filing Program is regulation of tax refund loans. These loans are made by out-of-state national banks. No banks in North Carolina are involved in making tax refund loans to

citizens of that state. There is no electronic filing of state tax returns in North Carolina. The North Carolina Act directly and inextricably effects interstate commerce. In addition, federal tax policy has historically been the exclusive domain of the federal government from the beginning of this nation.

Finally, the Opinion of the Supreme Court of North Carolina conflicts with a long line of decisions from this Court with respect to the Supremacy Clause and the Commerce Clause of the United States Constitution. The Opinion ignores field preemption and conflict preemption, and the practical effects of the Act on interstate commerce. Furthermore, the Supreme Court of North Carolina has decided an important federal constitutional question, which has not been, but should be settled by this Court.

I.

THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING PRE-EMPTION.

A. This Court Has Enunciated The Standards To Be Used In Determining Pre-emption.

This Court has long held that preemption may be either expressed or implied, and "is compelled whether Congress' command is explicitdly stated in the statute's language or implicitly contained in its structure and purpose." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Fidelity Federal Savings and Loan Assn. v. De la Cuesta, 458 U.S. 141, 152-153 (1982). Absent explicit pre-emptive language, this Court has recognized two types of implied pre-emption: field pre-emption and conflict pre-emption.

Field pre-emption occurs where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,'" Id. at 153 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). Conflict pre-emption occurs where "compliance with both federal and state regulations is a physical impossibility," Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); Perez v. Campbell, 402 U.S. 637, 649 (1971).

In Rice, the Illinois Commerce Commission sought to regulate the grain warehouse business. Rice, as owner and

shipper of grain, filed with the Illinois Commerce Commission a complaint charging respondent warehouse owners with violations of the Illinois Public Utility Act, the Illinois Grain Act and Article 13 of the Illinois Constitution. The violations alleged included operation without a state license, execution of unreasonable rates, failure to publish rates, failure to provide appropriate facilities, improper mixing of grades, discrimination in rates and conflict of interests as grain dealer and warehouseman.

This Court held that the Warehouse Act as amended by Congress in 1931 preempted the enforcement of the Illinois statutes in that the Amendments to the Warehouse Act sought to achieve fair and uniform business practices. Congress had formulated a policy on numerous phases of the warehouse business. Under the Act, the Secretary of

Agriculture had the right to suspend or revoke businesses. He also had the right to determine whether warehouses of applicants or licensees were suitable.

This Court concluded that if a warehouseman complied with federal requirements, he did all he need do. "He could not be required by a state to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act." Id. at 236.

In Rice, this Court emphasized at p. 236:

> The test, therefore, is whether the matter on which the state asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.

Ray v. Atlantic Richfield Co., 435 U.S. 151(1978) involved federal regulations

promulgated by the Secretary of the U.S. Department of Transportation. Section 391(5) of the Ports and Waterways Safety Act of 1972 provided for inspection of vessels for compliance with the Secretary's safety regulations. Title II also directed the Secretary to inspect tank vessels for compliance with regulations which he is required to issue for the protection of the marine environment. §391 a(6).

The State of Washington enacted a state statute known as the Tanker Law, which sought to regulate in particular aspects of the design, size and movement of oil tankers in Puget Sound. This Court held that the state was preempted by the federal Act. In so holding, this Court noted that the Act had entrusted to the Secretary the duty of determining which oil tankers were sufficiently safe to be allowed to proceed in the navigable waters

of the United States.

This Court concluded at p. 193:

> Refusing to accept the federal judgement, however, the State now seeks to exclude from Puget Sound vessels certified by the Secretary as having acceptable design characteristics, unless they satisfy the different and higher design requirements imposed by state law. The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment. Enforcement of the state requirement would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.

In Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982), the issue before the Court was the pre-emptive effect of a regulation, issued by the Federal Home Loan Bank Board, permitting federal savings and loan associations to use "due-on-sale" clauses

in their mortgage contracts. The Federal Home Loan Bank Board, pursuant to Congressional authorization, has the authority to promulgate regulations governing the powers and operations of every Federal savings and loan association from its cradle to its corporate grave. In 1976, the Board issued a regulation governing due-on-sale clauses (12CFR §545.8-3(f)). The Plaintiffs contended that Fidelity's exercise of the due-on-sale clause violated California's prohibition of unreasonable restraints on alienation under Cal. Civ. Code Ann §711. (West 1982).

This Court focused on the pre-emptive effect of federal regulations promulgated by a federal agency with broad powers. First, this Court noted that "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude

enforcement of state laws on the same subject." Id. at 153; Rice v. Santa Fe Elevator Corp., supra. at 230. Second, the broad language of § 5(a) of the Home Owner's Loan Act expressed no limits on the Board's authority to regulate the lending practices of federal savings and loans. Third, Congress delegated to the Board broad authority to establish and regulate a uniform system of savings and loan institutions where there are not any now, and to establish them with the force of government behind them, with a national charter. This Court noted that the Board had exercised that discretion, regulating comprehensively the operation of these associations, including their lending practices and specifically, the terms of loan instruments.

In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), this Court held

that Federal Communications Commission regulations pre-empted the State of Oklahoma from requiring cable television operators in Oklahoma to delete all advertisements for alcoholic beverages contained in the out-of-state signals that they re-transmit by cable to their subscribers. Quoting with approval the language in Fidelity Federal Savings and Loan Assn. v. De la Cuesta, supra. at 153-154, this Court stated:

> "Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited: 'If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care

> by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" Quoting United States v. Shimer, 367 U.S. 374, 383 (1961).

This Court has also clearly enunciated the tests to be used in determining conflict pre-emption. In Hines v. Davidowitz, supra., the Court was called upon to decide whether the federal Alien Registration Act pre-empted the Alien Registration Act adopted by the Commonwealth of Pennsylvania. In holding that the Pennsylvania statute was pre-empted by the federal Act, the Court said:

> Our principal function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is

> of importance that the legislation is in a field which effects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

In Morales v. Trans World Airlines, Inc., ____ U.S. ____, 112 S. Ct. 2031 (1992), this Court held that the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1301 et. seq. pre-empted the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes. The question of whether there was implied pre-emption was held to be one of statutory intent. This Court noted that "we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" FMC Corp. v. Holliday, 498 U.S.

_____, at _____, 111 S. Ct., at 407; Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194, 105 S. Ct. 658, 661-662, 83 L. Ed. 2d 582 (1985). In addressing the similarity between the Airline Deregulation Act and the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), this Court stated at p. 2037:

> True to our word, we have held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, "if it has a connection with or reference to such a plan." Shaw, supra., 463 U.S., at 97, 103 S. Ct., at 2900. Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted under 49 U.S.C. App. § 1305(a)(1).

In Gade v. National Solid Wastes Management Ass'n, ____ U.S. ____, 112 S. Ct. 2374 (1992), a trade association brought a declaratory judgement action to

enjoin the Illinois Environmental Protection Agency from enforcing Illinois laws providing for training, testing and licensing of hazardous waste site workers. This Court held that the state regulation of occupational safety and health issues which has not been approved by the Secretary of Labor, and for which the federal standard is in effect, is impliedly preempted as in conflict with the full purposes and objectives of the Occupational Safety and Health Act.

This Court stated at p. 2385:

> In determining whether state law "stands as an obstacle" to the full implementation of a federal law, Hines v. Davidowitz, 312 U.S. at 67, 61 S. Ct., at 404, "it is not enough to say that the ultimate goal of both federal and state law" is the same. International Paper Co. v. Ouellette, 479 U.S. 481, 494, 107 S. Ct. 805, 813, 93 L. Ed. 2d 883 (1987). "A state law also is pre-empted if it interferes with the

> methods by which the federal statute was designed to reach th[at] goal" Id.; see also Michigan Canners and Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 477, 104 S. Ct. 2518, 2527, 81 L. Ed. 2d 399 (1984) (state statute establishing association to represent agricultural producers pre-empted even though it and the federal Agricultural Fair Practices Act "share the goal of augmenting the producer's bargaining power"); Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286-287, 106 S. Ct. 1057, 1060-1061, 89 L. Ed. 2d 223 (1986) (state statute preventing three-time violators of the National Labor Relations Act from doing business with the State is pre-empted even though state law was designed to reinforce requirements of federal Act.)

In fact, under the Supremacy Clause, "any state law, however clearly written a State's acknowledged power, - which interferes with or is contrary to federal law, must yield. Id. at 2388; Felder v. Casey, 487 U.S. at 138 (quoting Free v.

Bland, 369 U.S. 663, 666, (1962). "Even state regulation designed to protect vital state interests must give way to paramount federal legislation." De Canes v. Bica, 424 U.S. 351, 357 (1976).

B. The Decision Of The Supreme Court Of North Carolina Violates The Tests Enunciated By This Court.

In United States v. Snyder, 149 U.S. 210 (1893), the Court recognized the pervasive and comprehensive system of federal income taxation:

> It scarcely seems necessary to look beyond the Constitution itself for a decisive reply to the question we are now considering. The eighth section of the first article declares that "The congress shall have power to lay and collect taxes, duties, imposts, and excises...but all duties, imposts, and excises shall be uniform throughout the United States." The power to impose and collect the public burdens is here given in terms as absolute as the language affords. The

> provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government and both the grant of power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected.

The power to tax and the importance of a uniform national scheme free from state control is so well entrenched in our constitutional history that the Court in Lyeth v. Hoey, 305 U.S. 188, 194 (1938) stated:

> In dealing with the meaning and application of an Act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted so as to give a

> uniform application to a nationwide scheme of taxation." Burnet v. Harmel, 287 U.S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependant upon state law.

In the case at bar, the Supreme Court of North Carolina's decision conflicts with the decisions of this Court concerning field and conflict pre-emption. First, the decision was bottomed on express pre-emption. The Court relied on decisions of this Court dealing with express pre-emption, such as Cipollone v. Liggett Group, Inc., 505 U.S. ____, 112 S. Ct. 2608 (1992).

Second, the Supreme Court of North Carolina's decision is devoid of any discussion of Congressional intent. Third, the Court focuses on whether a Revenue Ruling of the Internal Revenue Service is

comprehensive instead of analyzing the pervasive and uniform scheme of regulation by the federal tax system, including the Internal Revenue Code, Regulations and Revenue Procedures. Fourth, the decision was completely silent on conflict pre-emption. The Supreme Court of North Carolina did not discuss whether the state statute stood as "an obstacle to the execution of the full purposes and objectives of Congress." Hines v. Davidowitz, supra. at 67.

The intent of Congress regarding a uniform scheme of federal taxation is clearly set out in the federal statutes. Congress has expressly authorized the Secretary of Treasury "to prescribe all needful rules and regulations for the enforcement of [Title 26], including all rules and regulations as may be necessary by reason of any alteration of law in

relation to internal revenue." 26 U.S.C. § 7805(a). In addition, under 26 USC § 7805(c), "the Secretary shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps and other matters pertaining to the assessment and collection of internal revenue." 26 USC § 6402(a) grants the Secretary the authority to make refunds. See also 26 CFR 601.105.

Additionally, 26 USC § 6694-6696 expresses a clear intent by Congress to regulate and control third party federal tax return preparers. Congress has provided for explicit detailed instructions which govern preparer actions. Under 26 USC § 6107, third party preparers must furnish a copy of the return to the taxpayer. A third party return preparer must furnish an identifying number. 26 USC § 6109. And a third party return preparer

must furnish information returns. 26 USC § 6060.

Pursuant to delegated authority, the Internal Revenue Service has established extensive penalties for third party return preparers. (26 CFR 1.6695.1), established an application procedure and criteria relating to who can participate in electronic filing, (Rev. Proc. 93-8), enumerated duties which a preparer must perform (Rev. Proc. 93-8, Secs. 8, 9, and 10), and designated specific duties and procedures which a return preparer must follow in assisting a taxpayer with a refund loan. (Rev. Proc. 93-8, Sec. 10). Moreover, Congress has established a broad, all-encompassing definition of a return preparer. 26 USC § 7701(a) 36A.

Revenue Procedure 93-8, which superseded Revenue Procedure 91-69 and Revenue Procedure 90-62, states that it is

based on a series of federal tax regulations, specifically 26 CFR 601.602; Part I, Sections 6012, 6061: 1.6012-5, 1.6061-1. Revenue Procedure 93-8 is entitled "Obligations of Participants in the Electronic Filing Program for 1040, U.S. Individual Income Tax Return." The regulation of Refund Anticipation Loans or (RALS) is found in Sections 10.02, 10.03, 10.04, 10.06, 10.07, 10.08 and 10.09. Under Section 13, the service may suspend any electronic filer who violates any of the rules of the Internal Revenue Service's Electronic Filing Program.

The express intent of Congress to regulate and govern tax preparers in the above-mentioned activities is clear. In the House report summary, the House specifically established the intent and purpose of the sections dealing with tax preparers. The House Report states:

> "The Bill contains many provisions designed to improve the administration of the tax laws and protect the rights of taxpayers. There are rules to regulate tax return preparers." H.R. Rep. No. 658, 94th Cong., 2d Sess. 6 (1976), reported in U.S.C.C.A.N. 2897, 2901.
>
> The Senate Report further notes:
>
> The committee amendment provides disclosure requirements and standards of conduct which are applicable to income tax return preparers. It gives the Secretary of the Treasury the power to impose penalties or to seek injunctions against preparers because of certain specified prohibited practices. The Amendment is substantially the same as the House bill. S. Rep. No. 938, 94th Cong., 2d Session 351 (1976), reprinted in 1976 U.S.C.C.A.N. 3439, 3780.

The Supreme Court of North Carolina's decision holding that the Refund Anticipation Loan Act is constitutional is clearly in conflict with Snyder, Lyeth, and

the decisions of this Court discussed above regarding field pre-emption. Congress did not make its comprehensive federal taxing authority dependant upon state law. Lyeth v. Hoey, supra. In fact, this Court has long held that attempts by states to regulate any area which the Internal Revenue Service has already regulated constitutes a violation of the Supremacy Clause. United States v. Snyder, supra.; United States v. Union Cent. Life Ins. Co., 368 U.S. 291 (1961).

With regard to conflict pre-emption, the decision of the Supreme Court of North Carolina is also in conflict with decisions of this Court. The Refund Anticipation Loan Act sets up several obstacles to the accomplishment and execution of Congress carrying out its uniform scheme of federal tax policy.

Under the Refund Anticipation Loan

Act, N.C.G.S. § 53-247, a person must register with the North Carolina Commissioner of Banks before he can process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds. If a person does not register with the Commissioner of Banks, he is guilty of a misdemeanor, punishable by imprisonment of up to 60 days, a fine of up to two thousand dollars, or both.

Under N.C.G.S. § 53-248, a person must fill out an application in a form prescribed by the Commissioner, and pay him two hundred and fifty dollars for each office where the registrant intends to facilitate refund anticipation loans. After the application is filed, the Commissioner decides whether the registrant will be approved. The Commissioner can

turn the registrant down if he finds that he doesn't command the confidence of his community. Each year, the facilitator must renew the registration and pay one hundred dollars for each office where he intends to facilitate loans during the succeeding year.

Pursuant to N.C.G.S. § 53-249, a facilitator must disclose his schedule of loan fees to the Commissioner on or before January 2 of each year. If the Commissioner is of the opinion that the facilitator's fee is unconscionable, he may require the facilitator to pay the debtor three times the amount of the fee and possibly revoke the facilitator's registration. The Act further requires the facilitator to publish a fee schedule in a prominent place in each office with a statement to the effect that the taxpayer may have the tax return filed

electronically without also obtaining a refund anticipation loan. The facilitator must meet several disclosure requirements and may not engage in any of the prohibited activities, pursuant to N.C.G.S. § 53-250.

The Commissioner of Banks can issue a cease and desist order against a facilitator, or revoke his registration. The facilitator is also subject to civil penalties. The Commissioner, under N.C.G.S. §53-253 may promulgate rules and make investigations, subpoena witnesses, require audits and reports, and conduct hearings regarding possible violations of the Act.

Under the Internal Revenue Service's Electronic Filing Program for Form 1040, an applicant must complete an application, undergo testing of its transmitting capability, pass a suitability check, receive a letter of acceptance and obtain a

filing or transmitter identification number. (Sec. 4, Rev. Proc. 93-8). An electronic filer is required to charge a flat fee to assist a taxpayer in applying for an RAL. The fee must be identical for all taxpayers and must not be related to the amount of the refund or RAL. (Sec. 10.04, Rev. Proc. 93-8). The Internal Revenue Service also has very detailed rules for monitoring and suspending an electronic filer. (Rev. Proc. 93-8, Sec. 13). Under Section 6 of Rev. Proc. 93-8, the Internal Revenue Service has penalties for violations of its rules.

The North Carolina Refund Anticipation Loan Act acts as an obstacle to the accomplishment and execution of the objectives of Congress concerning the uniform national scheme of federal income tax policy. Tax preparers should not have to go through additional state hurdles when

they have met the requirements of the Internal Revenue Service's Electronic Tax Filing Program. The fact that tax preparers can be approved for the program by the Internal Revenue Service and then be turned down by the North Carolina Commissioner of Banks would clearly frustrate the intent of Congress regarding the tax refund process, especially refund anticipation loans.

The regulation of refund anticipation loan fees and other obstacles set up by the North Carolina Refund Anticipation Loan Act clearly frustrate Congressional intent regarding tax refund loans. The Supreme Court of North Carolina's decision is in conflict with Rice v. Santa Fe Elevator Corp., supra. in that the matter on which the state asserts the right to act is regulated by the Internal Revenue Code, Regulations and Revenue Procedures. The

North Carolina Act also interferes with the methods by which Congress has set up for implementation of federal income tax policy, including tax refund loans.

II.

THE NORTH CAROLINA REFUND ANTICIPATION LOAN ACT IS UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE EFFECT OF THE ACT IS TO CONTROL NATIONAL BANKING TRANSACTIONS BEYOND THE STATE'S BORDERS AND TO UNDERMINE UNIFORMITY OF REGULATION.

A. The Effect Of The North Carolina Refund Anticipation Loan Act Is To Control National Banking Transactions Outside Of The State.

The North Carolina Supreme Court held below in the instant case that the North Carolina Refund Anticipation Loan Act is constitutional because it does not directly

regulate interstate commerce. In so holding, the North Carolina Supreme Court examined primarily North Carolina's legislative purpose in enacting the statute. Such an analysis is directly in conflict with decided precedents of this Court.

In Hughes v. Oklahoma, 441 U.S. 322 (1979), this Court enumerated that: "This Court is not bound by the name, description or characterization given it by the legislature or the courts of the State but will determine for itself the practical impact of the law." Id. at 262. Similar effects analysis is found in other recent decisions of this Court. See Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); Wyoming v. Oklahoma, ____ U.S. ____, 112 S. Ct. 789 (1992). When a state statute in practical effect discriminates against interstate commerce, it will be struck down

as violative of the Commerce Clause. Wyoming, supra. at 800. In Shafer v. Farmers Grain Co., 268 U.S. 189 (1925), this Court recognized that "a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation, and invalid, regardless of the purpose with which it was enacted." Id. at 199.

The North Carolina Refund Anticipation Loan Act significantly impacts upon the interstate commerce of banking. The practical effect of the NCRALA is to control and regulate the conduct of National Banks beyond the borders of the state of North Carolina. None of the tax refund loans are made by banks inside of the borders of North Carolina. All of the tax refund loans which are made to North Carolina citizens are made by out-of-state National Banks. The state Act has a direct

impact on out-of-state lending transactions. No refund loan can be made by an out-of-state bank to a North Carolina citizen unless the North Carolina facilitator or taxpreparer has registered and been approved by the North Carolina Banking Commissioner. The significance of this negative effect on interstate commerce is that approximately ninety (90%) percent of those individuals in North Carolina who electronically file federal income tax returns also apply for refund loans.

Moreover, the North Carolina Supreme Court, although citing Edgar v. Mite Corp., 457 U.S. 124 (1982), failed to grasp the distinctions made in that case. In Edgar, this Court distinguished between intrastate securities transactions and interstate securities transactions. As this Court stressed in Edgar at p. 641:

> The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois.

Every lending transaction made by an out-of-state National Bank to a North Carolina citizen constitutes interstate commerce. The NCRALA is a substantial impediment to these interstate lending transactions. In Edgar, this Court similarly pointed out that securities transactions made outside of Illinois with Illinois citizens constitute interstate commerce: "These transactions would themselves be interstate commerce." Id. at 642. This Court emphasized in Edgar that the Illinois Act, unless complied with, sought to prevent MITE from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also

with those living in other states and having no connection with Illinois. As this Court noted, the Illinois law on its face would apply even if not a single one of Chicago Rivet's shareholders were a resident of Illinois.

Likewise, in the instant case, a North Carolina company which participates in electronic filing of federal tax returns could have a clientele solely of customers in Virginia or South Carolina or Tennessee, and yet the North Carolina Banking Commissioner could preclude the refund loans because of his non-approval of the North Carolina tax preparer. As this Court noted in Edgar:

> The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. In Southern Pacific Co. v. Arizona, 325 U.S. 761, 775, 89

> L. Ed. 1915, 65 S. Ct. 1515 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state..." Id. at 642-643.

The decision of the North Carolina Supreme Court conflicts with this Court's decision in Edgar v. Mite Corp., supra. The North Carolina Supreme Court failed to grasp the effects analysis in Edgar, and failed to recognize the importance of the banking transactions taking place outside of North Carolina's borders as it relates to the effect of the NCRALA on interstate commerce.

Furthermore, the decision in the instant case failed to address the practical effect that North Carolina regulation will likely have on a national basis. If North Carolina can impose such a state law to raise revenue and to allegedly

protect its consumers, then every other state could come up with its own regulations. In an era of budget shortfalls at the state level, this could be a convenient way of states raising substantial revenues quickly. However, if all of the other states were to adopt their own distinct laws, it would lead to the undermining of the comprehensive federal scheme of the Internal Revenue Service's Electronic Tax Filing Program. A national tax preparer might have to register and pay fees in every state, and be subject to the whims of each State's regulatory authority as to whether it was suitable to do business in that state. The result would be chaos. In Edgar this Court aptly noted at 642:

> Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions

> generated by tender offers would be thoroughly stifled.

In Healy, supra. at 336-337, this Court emphasized that:

> The practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

If each state were to enact its own regulatory scheme in this area, it would create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude. Healy at 337. The ramifications of such local economic regulation in this area by

all of the other states would be catastrophic. Realizing that electronic filing of federal tax returns and refund loans will be the norm by the end of this decade, certiorari should be granted by this Court to resolve this federal Constitutional question before the federal electronic tax filing program is undermined by competing state regulation.

In this era of national and regional banking, the power of national banks to make loans to citizens in other states is essential for the continued growth and economic viability of these banks. The power to make loans is a core life-sustaining function of all banks. The regulatory power given the North Carolina Banking Commissioner under the NCRALA directly impinges upon the ability of the national banks to sustain themselves by engaging in regional and national lending

across state boundaries.

B. The North Carolina Refund Anticipation Loan Act Undermines The Uniformity Of Federal Tax System.

In addition to the effect of the NCRALA on controlling national banking transactions beyond the state's borders, the Act also undermines the uniformity of national regulation. The North Carolina Supreme Court's decision is significantly flawed because it failed to even address the issue of uniformity of national regulation as it relates to the federal tax system. Article I, Section 8, Clause 1 of the United States Constitution provides for uniformity in the federal tax system. In Welton v. Missouri, 91 U.S. 275 (1876) at 280, this Court concluded:

> Where the subject to which the power applies is national in its character, or of such a nature as to admit of

> uniformity of regulation, the power is exclusive of all State authority.

This Court struck down a Missouri statute providing for a license tax on salespersons who sold goods manufactured outside the state and sold in Missouri. Emphasizing the need for uniformity of commercial regulation, this Court emphasized in Welton that such a state license tax would undermine the authority of the United States. In Welton, this Court explained how such state regulation could undermine the uniformity of commercial regulation. "Imports operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might

follow."

In Cooley v. Board of Wardens, 53 U.S. 299 (1851), this Court recognized that there are some areas of commerce which are left to the exclusive regulatory power and authority of Congress, and that these areas imperatively demand a single uniform rule. This has often been referred to as the exclusivity doctrine. Historically, the federal tax system and interstate travel, have been areas of exclusive federal regulation. See United States v. Snyder, supra. and Lyeth v. Hoey, supra.

This Court in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) held that the Arizona Train Liti Law, making it unlawful to operate within the State a passenger train of more than fourteen cars or a freight train of more than seventy cars, was violative of the Commerce Clause of the United States Constitution as applied to

interstate trains. This Court further pointed out that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the Commerce Clause from state interference. In Southern Pacific Co., supra., the Court concluded at 767:

> But ever since Gibbons v. Ogden, 9 Wheat. (US) 1, 6 L. ed 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

Pursuant to the plenary powers conferred upon Congress by the United States Constitution, the delegation by Congress to the Secretary of the Treasury, and its delegation of broad powers to the Internal Revenue Service, the Internal

Revenue Service has the power and authority to regulate all aspects of the federal tax system, including refunds. The service regulates who may participate and how individuals may participate in its national system of collection, dispersement, and refund of revenue. Specific revenue regulations and procedure detail these matters with respect to taxpayers, tax return preparers, and banks. 26 USCS § 6402, Revenue Procedure 91-69, Revenue Procedure 90-62, Revenue Procedure 93-8.

Electronic filing of federal tax returns constitutes electronic transmission of data across state lines, and the tax refund loans constitute lending transactions from national out-of-state banks to citizens within North Carolina. The tax preparer or facilitator is a conduit between the Internal Revenue Service and the Bank. Before a tax refund

loan is made, the IRS either accepts or rejects the return for electronic filing. If accepted, the IRS arranges for the direct deposit of the refund to a prearranged bank account at the National Bank. The Bank is subsequently reimbursed by the IRS. The entire process of electronic filing of federal tax returns and the tax refund loans inextricably involve interstate commerce. See Swartz v. H & R Block, Inc., 119 B.R. 219 (U.S. Bankruptcy Court, D. Idaho, 1990).

The out-of-state national banks would not be able to make tax refund loans without the assistance of the tax preparers. This is because these national banks do not have the means to determine on their own which federal taxpayers use electronic filing and are entitled to a refund. Under the strict disclosure rules, the out-of-state national banks would be

precluded from obtaining this information on their own. 26 USCS § 7213. Through a system of cooperation with tax preparers throughout the United States, tax return preparers are able to "facilitate" loan transactions based on the refunds due federal taxpayers. 26 USCS § 6713.

Congress has recognized the increasing importance of the tax return preparer in the federal filing system:

> The past few years have seen a substantial increase in the number of persons whose business is to prepare income tax returns for individuals and families of average income. The Internal Revenue Service estimates that for the year 1972, 35 million taxpayers, or one-half of all those who filed income tax returns, sought some form of professional or commercial tax advice in preparing returns. H.R. Rep. No. 658, 94th Cong., 2d Sess. 274 (1976), reprinted in 1976 USCCAN 2897, 3169.

It is only through a system of tax preparer cooperation that such tax refund

loans are possible. In such a system of restricted disclosure, it is not feasible economically for national out-of-state banks to contact all of the citizens of North Carolina to determine which ones plan to participate in the electronic filing of federal tax returns and tax refund loans in a given year. The NCRALA, by regulating tax preparers involved in the federal electronic filing program, burdens out-of-state national banks in their tax refund lending function vis.a.vis North Carolina taxpayers. As such, the North Carolina Refund Anticipation Loan Act is unconstitutional pursuant to the Commerce Clause of the United States Constitution in that the effect of the Act is to control national banking transactions beyond the borders of North Carolina and to undermine the uniformity of federal regulation.

Given the conflict between the

decision of the Supreme Court of North Carolina with the decisions of this Court concerning the Commerce Clause and the Supremacy Clause of the United States Constitution, and the importance of these constitutional questions on the federal tax and national banking systems, certiorari should be granted.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the decision of the court below reversed.

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